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In the Supreme Court of the United States

OCTOBER TERM, 1979

HEAVY LIFT SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

BARBARA G. GEHRING
Attorney
National Labor Relations Board
Washington, D.C. 20570

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-19) is reported at 607 F. 2d 1121. The decision and order of the National Labor Relations Board (Pet. App. 1-16) are reported at 234 N.L.R.B. 1078 (1978).

JURISDICTION

The judgment of the court of appeals was issued on January 3, 1980. On March 25, 1980, Mr. Justice Powell granted an extension of time in which to file a petition until April 22, 1980. The petition for a writ of certiorari was filed on April 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner's unsupported allegations of race discrimination by a union failed to raise disputed factual issues which precluded the General Counsel's motion for summary judgment.

STATEMENT

1. Pursuant to a stipulation for certification upon consent election executed by petitioner and Local 1680 of the International Longshoremen's Association ("the Union"), the Board conducted an election among petitioner's employees on October 26, 1973, which the Union won by a vote of 11 to 10. Petitioner filed timely objections to conduct affecting the results of the election. Following a hearing on certain of petitioner's objections, including an allegation that the Union had engaged in a campaign based on appeals to racial prejudice, the Board overruled the objections in their entirety and certified the Union as the bargaining representative of the unit employees (Pet. App. 4, 22-24).

2. Thereafter, on charges brought by the Union that petitioner had refused to bargain, an unfair labor practice complaint issued. Following receipt of petitioner's answer, the General Counsel moved for summary judgment. In an amended answer filed in response to the General Counsel's motion, petitioner denied that the Union had requested bargaining and raised for the first time, as an affirmative defense, the assertion that "the Union does now, and has in the past * * *, engaged in unlawful, illegal, and discriminatory racial practices as to employee and membership practices as to disqualify it from being certified as a labor organization within the meaning of Section 2(5) of the Act and to preclude it from remedial relief from a governmental agency." Petitioner submitted no evidence in support of its allegations of discrimination.

(Pet. App. 3.) However, because petitioner's answer raised disputed factual issues with respect to the Union's request to bargain and petitioner's refusal, on October 6, 1975, the Board ordered that a hearing be held to resolve that issue. With respect to petitioner's affirmative defense of union discrimination, however, the order stated (Pet. App. 3-4):

> [Petitioner's] request for a hearing on its affirmative defense that the Union is not entitled to certification because it has engaged in discriminatory conduct is denied. Mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing * * *. [Footnotes omitted.]

Petitioner did not file a motion for reconsideration of the Board's order (Pet. App. 4).[1]

At the subsequent hearing, the administrative law judge declined to admit evidence relevant to petitioner's affirmative defense of union discrimination ruling that petitioner was precluded from litigating that issue as a result of the Board's October 6 order (Pet. App. 4).[2] As to the issues in dispute, the judge found that the Union had requested bargaining and petitioner had refused to bargain. He concluded that petitioner's conduct violated Section 8(a)(5) and (1) of the Act and recommended that petitioner be required to recognize and bargain with the Union. (Pet. App. 17-35.)

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[1]Board Rules and Regulations, Section 102.48(d)(1) provide that any material error in the Board's decision may be asserted through a motion for "reconsideration, rehearing, or reopening the record." See *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[2]The judge did, however, permit petitioner to make a full offer of proof for the record (Pet. App. 4).

The Board (Member Jenkins dissenting) upheld the decision of the administrative law judge and issued, *inter alia*, a bargaining order. The Board agreed with the judge that petitioner was foreclosed from litigating the issue of alleged union discrimination during the unfair labor practice hearing. The Board explained that (Pet. App. 5-6):

> A motion for summary judgment is one of several traditional means by which adverse parties may be put to the test of their allegations prior to a full evidentiary hearing. Although the General Counsel bears the burden of proving all elements of an unfair labor practice violation in Board proceedings, the initial burden of proceeding with proof of an affirmative defense rests with [petitioner].
>
> The General Counsel's Motion for Summary Judgment on the complaint in this case was supported by relevant exhibits. [Petitioner's] reply in opposition and amended answer successfully controverted certain elements of the complaint, thereby establishing the existence of factual issues necessitating a hearing. [Petitioner] did not, however, offer any evidence to the Board in support of the affirmative defense, raised for the first time in its amended answer, that the Union has engaged in illegal racial discrimination.
>
> [B]ecause [petitioner] failed to support its affirmative defense allegation when procedurally compelled to do so, there was no factual issue thereafter to be litigated with respect to this defense.

In addition, the Board found that petitioner was precluded from litigating the issue of union discrimination at the unfair labor practice hearing because it had failed to raise the issue during the underlying representation

proceeding and had made no showing that its alleged evidence was unavailable and could not have been discovered prior to the Board's October 6 order (Pet. App. 7). The Board did not reach the issue of whether properly supported allegations of invidious racial discrimination by a union could have been raised in the instant proceeding because petitioner's allegations were not properly substantiated (*ibid.*).

3. The court of appeals enforced the Board's bargaining order, agreeing with the Board that petitioner was not entitled to a hearing on the issue of racially discriminatory union practices because "the allegation was not supported by sufficient evidence to overcome a motion for summary judgment" (Pet. 18). The court explained that:

> A motion for summary judgment puts adverse parties to the test of their allegations prior to a full evidentiary hearing. As the Board noted in its original order denying a hearing on the Union discrimination charges, "mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing." In its affirmative defense to the motion for summary judgment, [petitioner] failed to support its allegations with the minimal evidence necessary to show that a factual issue existed to necessitate a hearing. Without a "properly substantiated" prima facie showing of racial discrimination by the Union, [petitioner] was not entitled to a hearing on this affirmative defense. [Citations omitted.]

Citing its decision in *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977), the court added:

> [t]his Court will deny enforcement of a Board order on the grounds that the Board improperly refused a hearing on whether the union was racially discriminatory only when the employer has proffered specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the union which would support a finding of a definite propensity for racially unfair representation. (Pet. 18-19.)[3]

ARGUMENT

Petitioner contends that the Board may not constitutionally uphold the certification of, or extend remedial relief to, a union which discriminates unlawfully on the basis of race (Pet. 22). That question, however, is not presented in this case because the Board, upheld by the court of appeals, found that petitioner failed to support its allegations of race discrimination with the minimal evidence necessary to overcome a motion for summary judgment.[4]

While the party who moves for summary judgment has the initial burden of showing that there is no genuine issue as to the material facts entitling it to relief, if the moving party carries its preliminary burden, then the opposing party may not defeat the motion by relying on the

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[3]The court noted, however, that ~~the~~ had petitioner's claim of invidious racial discrimination been supported by specific evidence, it would properly have been brought before the Board during the proceedings on the refusal to bargain (Pet. 19).

[4]While the Board's Rules and Regulations do not contain a rule as detailed as Rule 56, Fed. R. Civ. P., the Board's Rules, Sec. 102.24 and 102.50, do allow for summary judgment and its use has long been approved by the courts. See, for example, *N.L.R.B* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 177-179 (6th Cir.), cert. denied, 389 U.S. 958 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGENS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

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National Labor Relations Board

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